

STATE OF MICHIGAN
COURT OF APPEALS

ALVIN W. MATHENEY,

Plaintiff-Appellant,

v

HOMESITE INSURANCE COMPANY OF THE
MIDWEST,

Defendant-Appellee.

UNPUBLISHED

April 15, 2010

No. 289599

Wayne Circuit Court

LC No. 08-104408-CK

Before: WHITBECK, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendant's motion for summary disposition. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In November 2006, plaintiff purchased a homeowner's insurance policy from defendant to insure a house he owned on Fairmount Drive in Detroit. Plaintiff's wife completed the actual application, by telephone. The house was at all relevant times used as rental property, and was one of several rentals owned by plaintiff. The policy that was issued, however, covered only owner-occupied residences. Specifically, the policy provided:

4. "Insured location" means:

a. The "residence premises";

b. The part of other premises, other structures and grounds used by you as a residence and:

(1) Which is shown in the Declarations; or

(2) Which is acquired by you during the policy period for your use as a residence;

c. Any premises used by you in connection with a premises in **4.a.** or **4.b.** above;

d. Any part of a premises:

- (1) Not owned by an “insured”; and
- (2) Where an “insured” is temporarily residing;
 - e. Vacant land, other than farm land, owned by or rented to an “insured”;
 - f. Land owned by or rented to an “insured” on which a one or two family dwelling is being built as a residence for an “insured”;
 - g. Individual or family cemetery plots or burial vaults of an “insured”; or
 - h. Any part of a premises occasionally rented to an “insured” for other than “business” use.

* * *

8. “Residence premises” means:

- a. The one family dwelling, other structures and grounds; or
- b. That part of any other building;

where you reside and which is shown as the “residence premises” in the Declarations. . . .

The policy also included a fraud provision:

2. Concealment or Fraud. The entire policy will be void if, whether before or after a loss, an “insured” has:

- a. Intentionally concealed or misrepresented any material fact or circumstance;
- b. Engaged in fraudulent conduct; or
- c. Made false statements;

relating to this insurance.

The next year, defendant sent a renewal notice, and plaintiff renewed the policy, effective November 15, 2007. On November 26, 2007, the 36th District Court ordered the eviction of plaintiff’s tenant from the Fairmount house. The next day, defendant sent a Notice of Termination of Insurance to plaintiff, informing plaintiff that his insurance was being cancelled because of “[s]ubstantial change in the risk,” stating that “[t]he insured dwelling is no longer an owner occupied secondary residence.” The notice indicated that coverage would be cancelled at 12:01 a.m. on December 16, 2007, and it included a refund check.

On November 30, 2007, a fire burned the house, rendering it uninhabitable. A forensics report indicated the blaze had been set with gasoline. Plaintiff filed a claim with defendant and

cooperated with defendant's investigation. Defendant requested that plaintiff and his wife submit to an examination under oath (EUO), and they both did so in January 2008. They testified that they could not recall being asked whether they occupied or rented the house. Defendant's sales supervisor and senior underwriter averred that sales agents are instructed to ask certain questions when completing applications, and one of those is whether the home is the applicant's primary or secondary residence. Although the application quote indicated that the sales agent had been told that this was a "secondary residence," Simone Matheney, defendant's wife, averred in an August 2008 affidavit that she had not told defendant's agent that this was an owner-occupied secondary residence. After the EUOs were completed, defendant denied the claim, stating that there was no coverage because "the insured property was not the residence premises as defined by the policy." Defendant indicated in its denial letter that it does not insure rentals or unoccupied properties.

When defendant refused to pay the claim, plaintiff brought this suit, raising counts of breach of contract, breach of express warranty, breach of implied warranty, and violation of the Michigan Uniform Trade Practices Act, MCL 500.2001 *et seq.* Both parties filed cross-motions for summary disposition. The trial court granted defendant's motion and denied plaintiff's motion, stating, "The property was not owner occupied. And the . . . application would have been rejected. And the policy never been issued."

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When a court evaluates a claim under MCR 2.116(C)(10),¹ substantively admissible evidence submitted at the time of the motion must be viewed in the light most favorable to the party opposing the motion and, in order to survive the motion, the non-moving party must come forward with at least some evidentiary proof upon which to base his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

Issues of contract interpretation are questions of law that are reviewed de novo. *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006).

Plaintiff argues that the language of defendant's cancellation notice indicated that coverage would remain in effect until December 16, 2007, and that this unambiguously provided coverage for the property on the date of the fire. We disagree. Plaintiff is confusing the issue of cancellation with that of coverage. An insurer may rescind coverage and declare the policy void if an insured misrepresents a material fact in applying for the policy. *General American Life Ins Co v Woiciechowski*, 314 Mich 275, 281-282; 99 NW2d 47 (1959); *Lake States Ins Co v Wilson*, 231 Mich App 327, 331; 586 NW2d 113 (1998). The insurer may rescind coverage even for an innocent misrepresentation, as long as the insurer relied on the misrepresentation. *Id.*; *General American Life*, 314 Mich at 282. A misrepresentation "that materially affects the acceptance of

¹ The trial court did not indicate whether it was relying on MCR 2.116(C)(8) or (C)(10) in granting defendant's motion, but we conclude that it looked outside the pleadings and thus relied on MCR 2.116(C)(10). *Gibson v Neelis*, 227 Mich App 187, 190; 575 NW2d 313 (1997).

the risk entitles the insurer retroactively to void or cancel a policy.” *Katinsky v Auto Club Ins Ass’n*, 201 Mich App 167, 170; 505 NW2d 895 (1993). Defendant would not have issued a policy for the home had it known the house was used as rental property. When defendant learned that the owner-occupied status of the home had been materially misrepresented to it, it was entitled to rescind the policy. All coverage was voided.

Even if the policy was considered to be in effect, there was no coverage because the policy only covered the “residence premises” or other property clearly not at issue here. Under the policy, the insured must have resided in the home for it to be covered. Indeed, the phrase “residence premises” was discussed in *Heniser v Frankenmuth Ins Co*, 449 Mich 155, 163-164; 534 NW2d 502 (1995), and the Michigan Supreme Court held that because the insured did not live in the house that burned, the house was not a “residence premises” and there was no coverage under the policy. The material language of the policy in *Heniser* is identical to that here, and we see no reason to reach a different result. The notice of cancellation cannot be relied on by plaintiff as providing coverage where none existed under the policy.

Plaintiff also argues that questions of material fact remain about whether plaintiff’s wife gave the agent incorrect information. Again, we disagree. Plaintiff does not dispute that defendant would not have issued the policy had it known the house was a rental. Because that is the case, a misrepresentation concerning the occupancy status of the house was material as a matter of law. *Montgomery v Fidelity & Guaranty Life Ins Co*, 269 Mich App 126, 129; 713 NW2d 801 (2005). Plaintiff’s wife stated in her EUO that she answered all of the sales agent’s questions and was told the application was approved. She also acknowledged that she could not recall all the questions that were asked. Defendant’s agents averred that the occupancy status of the home was something that would have been asked and that the quote application accurately reflected plaintiff’s wife’s answers. Thus, there was evidentiary support for defendant’s assertion that the misrepresentation was made by plaintiff’s wife, and there was insufficient opposing evidence to create a genuine issue of material fact.

Indeed, plaintiff cannot rely on his wife’s August 2008 affidavit. A plaintiff cannot use a later affidavit that is contrary to earlier, damaging testimony to create a question of fact. *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480-481; 633 NW2d 440 (2001). Because a material fact was misrepresented on the application, and because the policy would not have issued had the truth been known to defendant, the policy was void.

Finally, plaintiff argues that defendant should be estopped from denying the claim because he relied to his detriment on defendant’s cancellation notice. However, this issue was neither pleaded nor properly argued in the trial court,² and thus we decline to address it. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008).

² Plaintiff made a dilatory attempt to raise the issue in his motion for reconsideration. This was insufficient to preserve the issue for appellate review. *Farmers Ins Exchange v Farm Bureau Ins Co*, 272 Mich App 106, 117; 724 NW2d 485 (2006).

Affirmed.

/s/ William C. Whitbeck

/s/ Patrick M. Meter

/s/ Karen M. Fort Hood